

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34689

STATE OF IDAHO,	)	2009 Unpublished Opinion No. 506
	)	
Plaintiff-Respondent,	)	Filed: June 19, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
ELUITH S. DELGADO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Peter D. McDermott, District Judge.

Judgment of conviction and unified sentence of life imprisonment, with thirty years determinate, for kidnapping, affirmed.

John C. Souza, PLLC, Pocatello, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent.

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GUTIERREZ, Judge

Eluith S. Delgado was charged with first degree kidnapping and rape and pursuant to a plea agreement, pled guilty to the kidnapping charge, I.C. § 18-4502, and the state agreed to dismiss the rape charge and to not proceed with a habitual offender enhancement. The district court sentenced Delgado to a unified term of life imprisonment, with thirty years determinate. Delgado filed an Idaho Criminal Rule 35 motion for reduction of sentence, which the district court denied. Delgado appeals from his judgment of conviction and sentence, contending that the district court abused its discretion by imposing an excessive sentence and that the state violated the terms of the plea agreement.

Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *State v. Hedger*, 115 Idaho 598, 604, 768 P.2d 1331, 1337 (1989). We will not conclude on review that the sentencing court abused its discretion unless the sentence is unreasonable under the facts of the case. *State v. Brown*, 121

Idaho 385, 393, 825 P.2d 482, 490 (1992). In evaluating the reasonableness of a sentence, we consider the nature of the offense and the character of the offender, applying our well-established standards of review. See *State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 170 P.3d 387 (2007).

In making a sentencing recommendation pursuant to a plea agreement, the state is bound to honor the letter of the agreement and behave consistently with the terms of the agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *State v. Lankford*, 127 Idaho 608, 903 P.2d 1305 (1995). The burden is on the defendant to show that the prosecutor's overall argument disavowed or was fundamentally at odds with the position the state was obligated to take pursuant to the plea agreement. *Lankford*, 127 Idaho at 617, 903 P.2d at 1314 (sentence vacated because the state's comments at sentencing were "fundamentally at odds with the position the state was obligated to recommend"); *State v. Jones*, 139 Idaho 299, 303, 77 P.3d 988, 992 (Ct. App. 2003) (sentence vacated because the prosecutor's comments "effectively disavowed" the recommendation). Consistent with this standard, the state's recommendation may include information that is unfavorable to the defendant if the information is relevant to the court's sentencing determination, and may remind the court of the applicable legal standards. *State v. Brooke*, 134 Idaho 807, 810, 10 P.3d 756, 759 (Ct. App. 2000) (discussion of findings contained in the presentencing psychological evaluation does not constitute breach of a plea agreement); *State v. Richards*, 127 Idaho 31, 40, 896 P.2d 357, 366 (Ct. App. 1995) ("Unless the State has specifically agreed to the contrary, the prosecutor may legitimately refer to information relevant to the sentencing determination and may permissibly refer to the objectives of sentencing.")

The plea agreement entered into by the parties in the case at hand did not provide for any specific sentencing recommendations, but instead involved the state dismissing a charge and sentencing enhancement in exchange for Delgado's plea of guilty to one charge, to-wit:

I would advise the Court it's my understanding the State would agree to dismiss the habitual offender portion of the Information and dismiss the Rape charge. The defendant would plead guilty to first degree kidnapping, Your Honor.

We conclude the plea agreement did not restrict the prosecutor from addressing the facts of the evening of the kidnapping at the sentencing hearing.

Further, a sentencing court may, with due caution, properly consider uncharged or dismissed criminal conduct of a defendant as well. *State v. Wickel*, 126 Idaho 578, 581, 887 P.2d 1085, 1088 (Ct. App. 1994). The facts of this case include the victim's statements that Delgado threatened her a number of times over the course of the kidnapping, including telling her at one point he had a gun and at another he had a knife. Further, the victim described how Delgado raped her over the course of the kidnapping and Delgado himself admitted to the court at sentencing that he raped and threatened his victim. We find no error in the district court's consideration of the events occurring during the kidnapping incident.

Delgado further asserts but provides no legal support for the proposition that because the trial court gave consideration to the facts of the dismissed rape charge, Delgado's plea agreement was not made knowingly, willingly or voluntarily. Because Delgado has failed to show a violation of the plea agreement, he has not provided the Court with any basis to evaluate the voluntariness of his plea. *See Puckett v. United States*, 129 S.Ct. 1423, 1430 (2009) (a breach of a plea agreement does not retroactively cause a plea to have been unknowing or involuntary).

Having reviewed the record before the Court and considered the applicable standards, we conclude Delgado has not established any basis for vacating his judgment of conviction and sentence. We therefore affirm his judgment of conviction and sentence of life imprisonment, with thirty years determinate, for kidnapping.

Chief Judge LANSING and Judge PERRY **CONCUR.**